

**Office of Attorneys for Children  
Appellate Division, Fourth Department**

**Case Digest**

**Summer 2015**

**January - August 2015 Decision Lists**

## **ADOPTION**

### **Consent of Biological Father Not Required**

Family Court determined that respondent was not a father whose consent to the adoption of the subject children was required. The Appellate Division affirmed. Section 111 (1) (d) of the Domestic Relations Law provided that a child born out of wedlock may be adopted without the consent of the child's biological father, unless the father showed that he maintained substantial and continuous or repeated contact with the child, as manifested by: (i) the payment by the father toward the support of the child..., *and* either (ii) the father's visiting the child at least monthly when physically and financially able to do so..., or (iii) the father's regular communication with the child or with the person or agency having the care or custody of the child, when physically and financially unable to visit the child or prevented from doing so (emphasis supplied by the Court). It was undisputed that respondent paid only \$99.99 in child support since July 2003, and paid nothing between 2006 - 2012, notwithstanding a prior order directing him to pay at least \$25.00 per month. Thus, regardless whether respondent visited the child monthly or regularly communicated with the child, the court properly determined that he was a mere notice father whose consent was not required for the adoption of the subject children.

*Matter of Makia R.J.*, \_\_\_ AD3d \_\_\_ (4th Dept 2015)

## **CHILD ABUSE AND NEGLECT**

### **Mother Abused and Neglected Her Child**

After the child was hospitalized for, among other things, multiple rib fractures, a partially collapsed lung, and eye and ear injuries, petitioner commenced this proceeding. Family Court determined that the subject child was abused and neglected by respondent mother. The Appellate Division affirmed. The court erred in admitting the child's medical records from the child's treatment at two hospitals without a proper certification as required by the Family Court Act because the certification was not accompanied by the necessary delegation of authority. However, the error was harmless. Even excluding the medical records from consideration, the court's finding of abuse was supported by a preponderance of the evidence. The record contained detailed testimony from two physicians who examined the child and described the child's extensive injuries. Further, other testimony established that the mother twice forcibly squeezed the child's chest, which was consistent with the non-accidental nature of the child's injuries. The court was permitted to draw the strongest negative inference against the mother for her failure to testify. The record established that, viewed in the totality of the proceedings, the mother received meaningful representation.

*Matter of Bentleigh O.*, 125 AD3d 1402 (4th Dept 2015)

### **Petitioner Failed to Establish Mother's Neglect of Child**

Family Court determined that respondent mother neglected her child. The Appellate Division reversed and dismissed the petition. Petitioner failed to show that the child's physical, mental or emotional condition had been impaired or was in imminent danger of becoming impaired and that the actual or threatened harm to the child was a consequence of the failure of respondent to exercise a minimum degree of care in providing the child with proper supervision or guardianship. The evidence established that the mother left the child with appropriate caregivers, who she had been living with and who agreed to care for the child for several days; the mother left the State for approximately 24 hours without providing medical authorization in case of emergency; the male caregiver was unable to reach the mother during a confrontation with the child's grandmother while the mother was away, but that the mother borrowed a telephone and remained in contact with the caregivers each day she was away. The evidence also established that the mother was an inexperienced parent and that the couple with whom she lived assisted her with parenting skills and in obtaining appropriate housing and medical and other benefits. Petitioner failed to present any evidence connecting the mother's alleged mental health condition to any actual or potential harm to the child.

*Matter of Lacey-Sophia T.-R.*, 125 AD3d 1442 (4th Dept 2015)

### **Finding of Educational Neglect Affirmed**

Family Court determined that the subject child was neglected by respondent mother. The Appellate Division affirmed. Petitioner presented un rebutted evidence from the school district that the child had not attended a single day of school in the 2011-2012 and 2012-2013 school years. Thus, the court could properly conclude that the mental condition of the child was in imminent danger of becoming impaired. The mother failed to present evidence that the child was attending school and receiving required instruction in another place to establish a reasonable justification for the absences and therefore failed to rebut the prima facie evidence of educational neglect.

*Matter of Aijianna L.*, 126 AD3d 1353 (4th Dept 2015)

### **Admission of Neglect in Order on Consent**

Family Court found that the subject children were neglected by respondent mother and placed the children with petitioner. The Appellate Division affirmed. The mother's challenge to the finding of neglect was not reviewable because it was premised on the mother's admission, and therefore was an order on consent. Because the mother did not move to vacate or withdraw her consent to the order, her contention that her consent was not knowing, voluntary and intelligent was not properly before the AD. The court's dispositional order was supported by a sound and substantial basis in the record.

*Matter of Martha S.*, 126 AD3d 1496 (4th Dept 2015)

### **Aggravated DWI Supports Derivative Neglect Finding**

Family Court determined, among other things, that the subject child was derivatively neglected by respondent father. The Appellate Division affirmed. Petitioner presented evidence that respondent neglected the other subject child, he violated an order of protection issued for the benefit of the other subject child, and he was convicted upon his guilty plea of aggravated DWI. Although the one-year-old passenger in the vehicle the father was driving while intoxicated was not a subject of the instant petition, in this case, the circumstances surrounding the neglect of the other child showed fundamental flaws in the father's understanding of the duties of parenthood, which justified the finding that the father derivatively neglected the subject child.

*Matter of Alexia J.*, 126 AD3d 1547 (4th Dept 2015)

### **Court Did Not Err In Denying Motion to Strike Evidence**

Family Court determined that respondent father neglected the subject children by, among other things, inflicting excessive corporal punishment. The Appellate Division affirmed. The father's contention was rejected that Family Court denied him due process by allowing the children's mother, who was not a respondent in the neglect proceeding, to participate in the fact-finding hearing as a party even after she withdrew

her custody petition. The father did not timely object to the mother's participation. Thus, the objection was unpreserved for review. The father's related contention was rejected that the court erred in denying his motion to strike evidence elicited by the mother inasmuch as other evidence amply supported the finding of neglect.

*Matter of Cyle J.F.*, 128 AD3d 1364 (4th Dept 2015)

### **Reversal of Order Directing Return of Subject Child to Respondents**

Family Court directed the return of the subject child to respondents. The Appellate Division reversed and remitted the matter to Family Court for further permanency proceedings. Family Court's determination that there was no evidence that the child would face the possibility of future neglect or abuse while in respondents' care was not supported by a sound and substantial basis in the record. Petitioner commenced the proceeding alleging that the two-month-old subject child and 14-month-old Makynzie G. were severely abused children. The petition alleged that, while in the care of respondent father, Makynzie suffered a hypoxic brain injury, which was fatal. With respect to the subject child, the amended petition alleged that a full skeletal bone scan revealed that he had a spiral fracture of the upper left arm. Family Court erred in refusing to admit in evidence the amended autopsy report and the records of the pediatric orthopedist who examined the subject child. Although those uncertified records constituted hearsay evidence, evidence that was material and relevant was admissible at a permanency hearing, and the evidence was material and relevant. Despite an otherwise good relationship between respondents and their child, their inability to acknowledge his and/or her previous behavior supported the conclusion that they had a faulty understanding of the duties of parenthood sufficient to infer an ongoing danger to the subject child. The record established that, while in respondents' care, 14-month-old Makynzie died as a result of smothering, that the two-month-old subject child sustained a non-accidental, traumatic spiral fracture, and that the court lacked sufficient information to determine who caused the death and fracture. Although respondents complied with court-ordered services, without explaining the circumstances which led to Makynzie's death and the subject child's fracture, respondents could not effectively address the underlying parenting problems. Respondents' willingness to vaguely accept responsibility for the death and injury was not sufficient to support a determination that the subject child's best interests were served by returning him to the care and custody of respondents.

*Matter of Carson W.*, 128 AD3d 1501 (4th Dept 2015)

### **Court Erred in Entering Order of Protection Preventing Respondent From Having Unsupervised Visits With His Biological Children Until Youngest Biological Child Turns 18**

Family Court found that respondent sexually abused the daughter of his longstanding live-in girlfriend, and derivatively abused and neglected the girlfriend's son (appeal No. 2). Family Court further determined that, based on respondent's abuse of his

girlfriend's daughter, he derivatively abused and neglected his three biological children, and issued an order of protection directing respondent to stay away from his biological children, with periodic supervised access, until September 11, 2027, the date his youngest biological child would turn 18 (appeal No. 1). The Appellate Division modified by providing that the order of protection would expire September 26, 2014. In appeal No. 2, Family Court's finding of repeated sexual abuse of the girlfriend's daughter was supported by clear and convincing evidence. The child's out-of-court statements were sufficiently corroborated by the testimony of the child protective services caseworker to whom the child described the repeated abuse, as well as the testimony of petitioner's expert witness. Moreover, the court properly determined that respondent derivatively abused and neglected his girlfriend's son, and his three biological children. However, in appeal No. 1, the court erred in entering an order of protection preventing respondent from having unsupervised visits with his biological children before September 11, 2027. Family Court Act Section 1056 (1) prohibited the issuance of an order of protection that exceeded the duration of any other dispositional order in the case, and the dispositional order which placed respondent under the supervision of petitioner expired on September 26, 2014. Therefore, the expiration date of the order of protection entered with respect to respondent's biological children was also September 26, 2014.

*Matter of Ishanellys O.*, 129 AD3d 1450 (4th Dept 2015)

### **Grandmother Neglected Child By Feeding Mother's Known Drug Addiction**

Family Court determined that respondent grandmother neglected her granddaughter. The Appellate Division affirmed. Petitioner established by a preponderance of the evidence that the grandmother, who was a person legally responsible for the child, neglected the child. A child may be adjudicated to be neglected when a parent or caretaker knew or should have known of circumstances which required action in order to avoid actual or potential impairment of the child and failed to act accordingly. The evidence established that the grandmother knew that the mother was addicted to opiates and that the grandmother either illegally purchased suboxone for the mother or provided the mother with money knowing that the mother was going to use that money to buy suboxone herself. During this same period of time, the grandmother, who had informal custody of the child, allowed the mother to care for the child during the day.

*Matter of Crystiana M.*, 129 AD3d 1536 (4th Dept 2015)

### **Court Properly Refused to Include Transcript in Record**

Family Court entered an order of fact-finding and disposition on consent of the parties and the AFC that determined that respondent mother neglected the child (appeal No. 1). In a subsequent order settling the record on appeal, Family Court refused to include in the record on appeal the transcript of a proceeding before a court attorney referee two months after the court's determination, wherein respondent told the referee that she consented to the order because she was coerced by her attorney to do so (appeal No. 2). In appeal No. 2, the court properly refused to include the transcript in the record

inasmuch as the court's determination in appeal No. 1 was not based upon that information. Because the order at issue on appeal No. 1 was entered upon consent of the parties, appeal No. 1 was dismissed.

*Matter of Annabella B.C.*, 129 AD3d 1550 (4th Dept 2015)

### **Mother's Motion to Vacate prior Orders Properly Denied**

Family Court denied respondent mother's motion to vacate various orders. The Appellate Division affirmed. The court properly denied the motion without a hearing because there was insufficient evidence on the issue of good cause to vacate the prior order. The mother could not properly assert the alleged violation of the father's due process rights. The mother also failed to show that a progress note was not disclosed during discovery of the underlying abuse and neglect proceeding against the father, and therefore, this evidence was not newly discovered. Further, the progress note would likely not have produced a different result in light of the evidence that the father sexually abused the subject children.

*Matter of Arkadian S.*, \_\_\_ AD3d \_\_\_ (4th Dept 2015)

## **CHILD SUPPORT**

### **Court Erred in Calculation of Combined Parental Income**

Supreme Court entered a judgment of divorce ordering defendant to pay child support, among other things. The Appellate Division modified and remitted for further proceedings. The court erred in its calculation of the combined parental income pursuant to Domestic Relations Law Section 240 (1-b) © (1) by deducting the amount of maintenance from defendant's gross income without providing for an adjustment in child support upon the termination of maintenance, and by adding the amount of maintenance to plaintiff's income. Plaintiff's imputed net income was \$6,000; defendant's imputed net income was \$2,000,000. The combined parental income was \$2,006,000, and the pro rata shares were 0.3% from plaintiff, and 99.7% from defendant. Therefore, defendant's child support obligation was increased to \$46,101.28 per year, or \$3,841.77 per month. Plaintiff's contention was rejected that the court abused its discretion in not applying the Child Support Standards Act to the combined parental income in excess of the statutory cap up to \$350,000. The record established that the court considered the appropriate factors in applying an income cap of \$272,000, rather than \$350,000.

*Lazar v Lazar*, 124 AD3d 1242 (4th Dept 2015)

### **Fugitive Disentitlement Theory No Longer Applied to Respondent**

Family Court applied the fugitive disentitlement doctrine to respondent. The Appellate Division reversed and remitted for further proceedings. The Appellate Division previously dismissed respondent's appeal from an order of dismissal entered by the court upon declining to sign an order to show cause seeking to vacate two orders entered on respondent's default. One of the orders determined that respondent was in willful violation of a child support order, and the other order committed him to a term of six months of incarceration. The court also issued a warrant for respondent's arrest. The Appellate Division determined that the fugitive disentitlement theory applied to both respondent's order to show cause and to the subsequent appeal. Nonetheless, it granted respondent leave to move to reinstate his appeal upon the posting of an undertaking in the amount of \$25,000. Respondent timely posted the undertaking and his motion to reinstate the appeal was granted. By posting an undertaking in the amount of the child support arrears, respondent demonstrated that he was not flouting the judicial process and provided a means of enforcement of the court's order determining the amount of child support arrears in the event that the court's determination was unchanged. Thus, the fugitive disentitlement theory no longer applied to respondent.

*Matter of Shehatou v Louka*, 124 AD3d 1335 (4th Dept 2015)

### **Order Reversed; Child Not Emancipated**

Family Court denied the objections of petitioner to the order of the Support Magistrate, who determined that respondent father was relieved of his support obligation because the father established that the child was emancipated. The Appellate Division reversed and remitted for further proceedings to determine the amount of retroactive support. The father failed to meet his burden to show that the child was emancipated. During the relevant time period, the father was no longer the custodial parent when the child became eligible for public assistance. The child had lived with his mother for years before he moved into his own apartment and started receiving public assistance. The father failed to present any evidence that the child had abandoned a relationship with him during the relevant time period; rather, the record established that the father gave the child monetary support after the child moved out of the mother's home and that the father spoke to the child throughout the proceedings.

*Matter of Oneida County Dept. of Social Servs. v Christman*, 125 AD3d 1409 (4th Dept 2015)

### **Child Support Order Affirmed**

Family Court denied the objections of respondent father to the order of the Support Magistrate. The Appellate Division affirmed. Although the father contended that he should not have to pay bills that were already paid by him or were not medical bills, he failed to identify any particular bill or receipt for which reimbursement should not be ordered, and therefore his objections lacked requisite specificity. Further, the father did not contend in his written objection that the mother's proof was not competent or that she had not paid the bills for which she sought reimbursement, and therefore his contentions to that effect were not properly before the appellate court.

*Matter of Farruggia v Farruggia*, 125 AD3d 1490 (4th Dept 2015)

### **No Error in Requiring Court Order For Medical Income Execution**

Family Court denied the objection of petitioner County Department of Health and Human Services to the order of the Support Magistrate, who determined that, among other things, if health insurance benefits became available to either respondent parent, DSS or either party could file a modification petition seeking a court order obligating a party to provide health insurance benefits for the child and a medical income execution could not be issued without such court order. Petitioner's contention that it was error to include in the order that medical income execution could not be issued without court order because the CPLR provided that petitioner could issue a medical income execution to a new employer of the parent without going to the court, was misplaced. The statute was not applicable, because here, neither parent provided health insurance coverage for the child at the time the order was issued, whereas the statute applied where the parent initially provided coverage and then changed employment. Contrary to petitioner's further contention, a medical income execution could be issued only where a court had ordered a parent to provide health insurance benefits, and that had not occurred here inasmuch as the Support Magistrate determined that such benefits were

not available.

*Matter of Chautauqua County Dept. of Health and Human Servs. v Matteson*, 126 AD3d 1338 (4th Dept 2015)

### **Matter Remitted Where Court Failed to Make a Clear Custody Determination and Child Support Calculation Flawed**

Supreme Court entered a judgment of divorce ordering plaintiff to pay child support, among other things. The Appellate Division modified and remitted for further proceedings. The court failed to make a clear custody determination with respect to the two children, thus hindering meaningful review of the child support award. In its decision, the court stated that the older child was living with plaintiff, and that the younger child was rotating between both houses equally. However, at trial, both parties testified that they had a week-on, week-off child custody arrangement relative to both children. The court apparently accepted plaintiff's unsubstantiated assertion in his post-hearing submission that the older child had moved in with him, and would not be returning to defendant's house. With respect to the younger child, the judgment stated that, by stipulation and agreement, the parties shall share custody, with defendant designated as the primary residential parent for school purposes. No such stipulation appeared in the record. The older child was not referenced in the judgment at all. Even assuming, arguendo, that the court made an implicit custody determination, the child support calculation was flawed. The court failed to explain its application of the precisely articulated, three-step method for determining child support pursuant to the Child Support Standards Act (CSSA). The court failed to set forth the combined parental income, the parties' pro rata shares of the child support obligation, and failed to determine whether to award child support for the amount of combined parental income in excess of the statutory cap. The record was insufficient to determine the appropriate amount of child support. Therefore, the matter was remitted and the court was directed to make a custody determination with respect to both children, and to recalculate child support pursuant to the CSSA.

*Murphy v Murphy*, 126 AD3d 1443 (4th Dept 2015)

### **Affirmance of Child Support Order**

Family Court denied petitioner's objection to the order of the Support Magistrate. The Appellate Division affirmed. The Support Magistrate's findings were entitled to great deference. The record supported the determination that the father failed to demonstrate a substantial change in circumstances that would justify a downward modification of his support obligation because he did not present sufficient evidence establishing that he diligently sought re-employment commensurate with his former employment.

*Matter of Perez v Johnson*, 128 AD3d 1469 (4th Dept 2015)

## **Reversal of Denial of Objections to Order of Support Magistrate**

Family Court denied the objections of petitioner to an order of the Support Magistrate. The Appellate Division reversed, granted the objections, granted the petition and directed respondent to pay child support in the amount of \$26 per week retroactive to September 12, 2013, the date on which the children became eligible for public assistance. The Support Magistrate calculated respondent's presumptive support obligation at \$26 per week, but determined that respondent was not obligated to pay support because he had physical custody of the children for a majority of the time under his custody arrangement with the mother, and thus was not a noncustodial parent within the meaning of Family Court Act Section 413 (1) (f) (10). The custody order between respondent and the mother was intended to divide physical custody of the children equally. Respondent, as the parent with the higher income and greater pro rata share of the child support obligation, was therefore the noncustodial parent for support purposes, and should have been ordered to pay child support to the mother. In addition, the children's receipt of public assistance precludes respondent from obtaining any reduction of his support obligation based on expenses incurred while he had custody of the children.

*Matter of Oneida County Dept of Social Servs v Benson*, 128 AD3d 1524 (4th Dept 2015)

## **Child's Return to Noncustodial Parent's Supervision and Control Did Not Preclude Revival of Unemancipated Status**

Supreme Court denied that part of defendant father's motion seeking an award of child support. The Appellate Division reversed, granted that part of the father's motion seeking child support, and remitted the matter to Supreme Court to calculate the amount of child support owed by plaintiff mother to the father. The court erred in concluding that the child's return to parental custody and control neither revived his unemancipated status nor reinstated the support obligations of his parents. The record established, and the parties stipulated, that the child was constructively emancipated in June 2012 when he moved out of the mother's residence and into an apartment with friends in an effort to avoid the mother's rules requiring him to attend school and not use illicit drugs. The child moved in with his father after being treated for withdrawal. A child's unemancipated status may be revived provided there was a sufficient change in circumstances to warrant the corresponding change in status. Generally, a return to the parents' custody and control has been deemed sufficient to revive a child's unemancipated status. Although most of the cases concerning a revival of a child's unemancipated status involved a child's return to the home that he or she abandoned, versus the home of the noncustodial parent, the return to the noncustodial parent's supervision and control did not preclude a revival of unemancipated status inasmuch as it had generally been held that the move from one parent's home to the other parent's home did not constitute emancipation because the child was neither self-supporting nor free from parental control.

*Baker v Baker*, 129 AD3d 1541 (4th Dept 2015)

### **Appeal From Order of Commitment Dismissed**

Family Court committed respondent father to jail for six months based on a finding of the Support Magistrate that respondent willfully violated a prior child support order. The Appellate Division dismissed the appeal. Respondent contended that the Support Magistrate erred in finding that respondent's admitted failure to pay child support was willful, inasmuch as he demonstrated at the violation hearing that he was unable to pay the amount due. Because respondent appealed only from the order of commitment, and not from the order finding that he willfully violated the child support order, the appeal was dismissed.

*Matter of Rafferty v Rafferty*, 129 AD3d 1644 (4th Dept 2015)

### **Order Determining that Plaintiff Was Not Entitled to Share in Child Tax Credits for Parties' Children Reversed Where Disputed Provision Was Ambiguous**

Supreme Court found that, under the unambiguous terms of the parties' separation agreement, plaintiff was not entitled to share in child tax credits for the parties' two children. The Appellate Division reversed and remitted for a hearing to determine the parties' intent with respect to the disputed provision. Fundamental, neutral precepts of contract interpretation provide that agreements are to be construed in accord with the parties' intent, and the best evidence of what the parties intended was what they said in their writings. Courts may consider extrinsic or parol evidence of the parties' intent only if the contract was ambiguous. Article XIX (E) of the separation agreement read: "Commencing with the 2008 tax year the Wife shall share with the Husband fifty percent of any child tax credit, or any such similar tax credit not based upon income or payments that the Wife may have made by or on behalf of a child, that she may receive relating to the filing of her federal and state income tax returns after 2008. The Wife shall also share with the Husband fifty percent of any future economic stimulus or any similar such payment she may receive as a result of her claiming the children on her federal income tax return." Article XIX (E) of the parties' separation agreement was ambiguous because it was reasonably susceptible of more than one interpretation. Plaintiff's interpretation appeared more reasonable than that proffered by defendant, pursuant to which plaintiff was not entitled to share in the child tax credits because they were based on defendant's income. The amount of basic child tax credit was, indeed, always dependent on the income of the person who claimed the credit. Thus, pursuant to the court's interpretation of the provision, plaintiff would never share in the tax credit and, if that were the case, there would have been no need for the first phrase of the first sentence, i.e., "Commencing with the 2008 tax year the Wife shall share with the Husband fifty percent of any child tax credit." Furthermore, defendant's own attorney, in a letter sent to opposing counsel approximately two years before this proceeding was commenced, acknowledged that plaintiff was entitled to share in the child tax credits.

*Colella v Colella*, 129 AD3d 1650 (4th Dept 2015)

## **Referee Erred in Failing to Include Value of Plaintiff's Food Stamps in Her Yearly Income**

Supreme Court entered a judgment directing defendant husband to pay maintenance to plaintiff wife and directed plaintiff to pay child support in the amount of \$300 per year to defendant. The Appellate Division modified the judgment by vacating the award of child support, and remitted. The Referee, whose Report and Recommendation was confirmed by the court, did not err in excluding plaintiff's maintenance award from her income in calculating her child support obligation. There was no authority in the Child Support Standards Act (CSSA) for adding future maintenance payments to the recipient's income for the purpose of calculating child support. Furthermore, the Referee did not err in declining to impute additional income to plaintiff based on her ability to work. There was no evidence that plaintiff had reduced resources or income in order to reduce or avoid the parent's obligation for child support. However, the Referee erred in failing to include the value of plaintiff's food stamps in her yearly income for purposes of calculating her child support obligation. Food stamps were not public assistance to be deducted from income pursuant to Domestic Relations Law Section 240 (1-b) (b) (5) (vii) (E) inasmuch as Social Services Law article 5, which governs public assistance, refers to "public assistance or food stamps" (Social Services Law Section 131 [12]), thereby distinguishing the two. Because plaintiff's income did not fall below the poverty income guidelines when the value of her food stamps was included, the judgment was modified by vacating the award of child support, and the case was remitted for a recalculation plaintiff's child support obligation in compliance with CSSA.

*Lattuca v Lattuca*, 129 AD3d 1683 (4th Dept 2015)

## **Parties' Financial Resources, Including Father's Inheritance, Justified Child Support Award to Mother**

Supreme Court, among other things, awarded plaintiff mother child support. The Appellate Division affirmed. Although the roughly equal incomes of the parties and their shared custody arrangement would ordinarily result in no award of child support to either party, after considering the parties' respective financial resources, including defendant father's inheritance, the court properly awarded child support to plaintiff mother.

*Vural v Vural*, \_\_\_\_ AD3d \_\_\_\_ (4th Dept 2015)

## **Matter Remitted Where Court Failed to Direct Retroactive Support Modification**

Supreme Court, among other things, denied defendant father's request for reimbursement from plaintiff mother for health insurance premiums paid by him, and granted him a downward modification of child support. The Appellate Division modified and remitted for further proceedings. Although the parties' agreement required plaintiff to provide health insurance coverage, defendant husband failed to establish his entitlement to reimbursement inasmuch as he failed to show how much he actually paid

for insurance premiums for a family plan, rather than an individual plan. The court erred in not directing that the child support modification be retroactive to the date of defendant's application and in failing to adjust the parties' pro rata share of health insurance expenses and child care expenses, when it modified defendant's request for a downward modification of child support.

*Petroci v Petroci*, \_\_\_ AD3d \_\_\_ (4th Dept 2015)

## **CUSTODY AND VISITATION**

### **Sole Custody to Mother Affirmed**

Family Court granted sole custody of the parties' children to petitioner mother. The Appellate Division dismissed as moot the appeal from the order insofar as it concerned the parties' older daughter, who had attained the age of 18, and affirmed. With respect to the issue of custody of the younger child, assuming, arguendo, that the Judicial Hearing Officer's prehearing statement, i.e., that she saw no other outcome for the case than to award custody to the mother, was improper, the record was sufficient for the Appellate Division to exercise its authority make a best interests determination. It was in the child's best interests to award custody to the mother. The mother established that she was more likely to provide stability and continuity for the child, and was better able to provide financially for the child, among other things. In addition, the mother presented evidence of domestic violence committed by the father, and the Attorney for the Child indicated that the child, who was now 16 years of age, wished to live with her mother.

*Matter of Caughill v Caughill*, 124 AD3d 1345 (4th Dept 2015)

### **Award of Primary Physical Custody to Father Supported By Record**

Family Court modified a prior custody order by awarding respondent father primary physical custody of the parties' child, with visitation to petitioner mother. The Appellate Division affirmed. Under the prior order, the parties shared residential custody of the child, with the child moving from one parent to the other on Wednesdays. That schedule was no longer practical upon the child's attainment of school age. The court did not abuse its discretion in awarding the father custody of the child during those days of the week when school was in session. There was no basis to disturb the court's determination inasmuch as it was based on the court's credibility assessments of the witnesses and was supported by a sound and substantial basis in the record. The mother failed to submit any expert testimony or evidence establishing that it was in the child's best interests to attend school in the Town of Clinton and, instead, presented only her own speculative testimony.

*Matter of Biagini v Parent*, 124 AD3d 1368 (4th Dept 2015)

### **Affirmance of Award of Sole Custody of Children to Father**

Family Court modified a prior custody order entered upon consent of the parties by awarding sole custody of the children to petitioner father, with visitation to respondent mother. The Appellate Division affirmed. Although the court did not expressly identify a change in circumstances, the record demonstrated unequivocally that a significant change in circumstances occurred since the entry of the consent order. Moreover, the record supported the court's determination that it was in the children's best interests to award sole custody to the father. The mother's contention was rejected that the court

placed undue emphasis on her failure to comply with discovery orders. The court did not abuse its discretion with respect to the emphasis placed on the mother's noncompliance as a factor in the best interests analysis, and the discovery sanction imposed did not adversely affect the children's right to have issues affecting their best interests fully explored. Moreover, the court properly transferred temporary custody to the father before conducting the custody hearing inasmuch as the father demonstrated the necessary exigent circumstances warranting the temporary transfer. Even assuming, arguendo, that the court erred in transferring temporary custody, reversal was not required because the court subsequently conducted the requisite evidentiary hearing, and the record fully supported the court's determination following the hearing.

*Matter of Morrissey v Morrissey*, 124 AD3d 1369 (4th Dept 2015)

### **Petition Properly Dismissed**

Family Court dismissed petitions filed by respondent father. The Appellate Division affirmed. The court did not err in sua sponte dismissing, in the interests of justice and without a hearing, the father's final petition to modify custody and visitation. That petition was supported solely by an affidavit already before the court. The allegations contained in that petition, including allegations of a change of circumstances, were duly reviewed, argued and considered by the court in the context of petitioner mother's motion to dismiss.

*Matter of Sierak v Staring*, 124 AD3d 1397 (4th Dept 2015)

### **Joint Custody in Children's Best Interests; Mother's Request to Relocate Children to Netherlands Properly Denied**

Supreme Court awarded the parties joint custody of the subject children and denied defendant mother's request to relocate the children to the Netherlands. The Appellate Division affirmed. There was a sound and substantial basis for the court's determination that joint custody was in the children's best interests because although there was some acrimony between the parties, they were not so embattled and embittered as to effectively preclude joint decision making. The court did not err in denying the mother's request to relocate with the children to the Netherlands. Because this case involved an initial custody determination, it was not a relocation case to which the *Tropea* factors applied. Here, the effect of relocation as part of a best interests analysis was but one factor among many in the custody determination. The court properly determined that the children's relationship with the father would be adversely affected by the proposed relocation because of the distance between Erie County and the Netherlands. The court did not err in refusing to allow the testimony of one of the children's therapists because the AFC did not consent to the disclosure of confidential communications between the child and therapist.

*Forrestel v Forrestel*, 125 AD3d 1299 (4th Dept 2015)

### **Family Court Party Need Not Show Actual Prejudice to Prevail on Ineffective Assistance of Counsel Claim**

Family Court, among other things, designated the location of respondent father's supervised visitation with the subject child to be in North Tonawanda. The Appellate Division affirmed. There was no basis to disturb the court's determination that supervised visitation with the subject child would better serve the child's best interests if it was located in North Tonawanda, rather than in Buffalo where the father had requested it be located. In reviewing the father's contention that he was denied effective assistance of counsel, the Appellate Division noted that the Family Court Act afforded protections equivalent to the constitutional standard of effective assistance of counsel afforded defendants in criminal cases and, therefore, actual prejudice need not be shown to prevail on a claim of ineffective assistance of counsel. Any prior decisions to the contrary were no longer to be followed. Nevertheless, here, the father failed to show the absence of strategic or other legitimate explanations for counsel's alleged shortcomings at the hearing.

*Matter of Brown v Gandy*, 125 AD3d 1389 (4th Dept 2015)

### **Relocation Not in Child's Best Interests**

Family Court denied the cross petition of respondent mother seeking to relocate with the parties' child to Tennessee. The Appellate Division affirmed. The court properly determined that relocation was not in the best interests of the child after considering all the relevant *Tropea* factors, and the mother failed to meet her burden to show that the proposed relocation was in the best interests of the child. The court properly determined that the child's relocation would have a negative effect on the child's relationship with her father and that the child's life would not be enhanced economically, emotionally and educationally by the relocation. Although the mother mainly relied upon economic necessity as the basis for her request, she failed to establish that the employment she was offered would last for a significant period and she also failed to show that she did not have similar opportunities in New York.

*Matter of Hill v Flynn*, 125 AD3d 1433 (4th Dept 2015)

### **Mother Showed Changed Circumstances; Supervised Visitation to Father Affirmed**

Family Court directed that respondent father have supervised visitation with the parties' child. The Appellate Division affirmed. Petitioner mother established a sufficient change in circumstances that reflected a genuine need for modification. The mother established that the father was engaged in an altercation with the child's grandmother in the presence of the child, resulting in police intervention, and that the father fired a shot from a BB gun that narrowly missed the child while she was trying to set up a target. Although the court erred in considering the father's 2010 mental health evaluation, rather than a more recent one, the error was harmless because even absent

consideration of either evaluation, there was a sound and substantial basis for the supervised visitation determination.

*Matter of Rice v Cole*, 125 AD3d 1466 (4th Dept 2015)

### **Relocation in Children's Best Interests**

Family Court granted the mother permission to relocate with the parties' child to Massachusetts. The Appellate Division affirmed. The court properly considered the *Tropea* factors in determining that relocation was in the best interests of the child. The mother established that the relocation was justified by economic necessity. The mother's husband, who was in the Coast Guard, was transferred to Massachusetts and although he chose to remain in the Coast Guard, that choice provided stability in employment in an economically turbulent time, as well as benefits including health insurance for his family. Both the mother and her husband testified that they expected substantial salary increases after the transfer. Although the transfer will affect the frequency of the father's visitation, the mother agreed to maintain and facilitate a visitation schedule that will afford the father extensive contact with the child.

*Matter of Newman v Duffy*, 125 AD3d 1474 (4th Dept 2015)

### **Not in Child's Best Interests to Visit Incarcerated Father**

Family Court granted petitioner father supervised visitation with the parties' child. The Appellate Division reversed and dismissed the petition. The court's determination lacked a sound and substantial basis in the record. Contrary to the AFC's contention, the court did not err in denying the motion to dismiss the father's petition before holding a hearing on the child's best interests. The AFC was correct, however, that the court abused its discretion in granting the petition for visitation. The presumption in favor of visitation where a parent is incarcerated was rebutted by a preponderance of the evidence that such visitation would be harmful to the child. Here, the parties married while the father was incarcerated and he was still incarcerated at the time of the child's birth. The father admitted that he did not have a relationship with the child; he testified that he believed his sister or mother might drive the child to the prison; the trip required three hours of driving in total; and the child did not have a relationship with the sister or mother. The father admitted to engaging in domestic violence against the mother and the mother testified that the father choked her during one fight when she was pregnant with the subject child. Further, the father admitted that he violated an order to stay away from the mother; that he had been in a fight with another inmate while in prison; and that he went "on the run" from parole officers.

*Matter of Carroll v Carroll*, 125 AD3d 1485 (4th Dept 2015)

### **No Error in Grant of Joint Custody Where Mother Did Not Oppose Joint Custody**

Family Court awarded the parties joint legal and shared physical custody of the subject

child. The Appellate Division affirmed. Because the mother, at the end of the trial, informed the Referee that although she was seeking primary physical custody, she was not opposed to the parties having joint legal custody, she should not now complain that the Referee erred in failing to award her sole legal custody. There was a sound and substantial basis for the Referee's determination inasmuch as the parties were not so embattled and embittered to effectively preclude joint decision making. Although the Referee abused his discretion in refusing to allow the child's maternal grandmother to testify as a fact witness at trial, the error was harmless because the grandmother did testify on rebuttal, and the mother failed to specify what testimony the witness could have given on direct that the mother did not offer herself. Although the AFC contended that the case should be remitted for further proceedings in light of events after entry of the order on appeal, the Appellate Division concluded that those events would be more properly considered by the court on a petition to modify custody based upon a change in circumstances.

*Matter of Mayes v LaPlatney*, 125 AD3d 1488 (4th Dept 2015)

### **Nonparent Failed to Establish Extraordinary Circumstances**

Family Court awarded sole custody of the subject child to petitioner father. The Appellate Division affirmed. Respondent, a nonparent, failed to meet her burden to establish extraordinary circumstances. In view of respondent's repeated failures to appear, the court did not err in refusing to adjourn the hearing when respondent failed to appear. The court properly took judicial notice of its own prior proceedings with respect to the father's paternity.

*Matter of Wilson v McCray*, 125 AD3d 1512 (4th Dept 2015)

### **Court Erred in Conditioning Joint Custody on Mother's Participation in Counseling**

Family Court adjudged that petitioner mother willfully violated a court order and sentenced her to six weekends in jail and ordered the parties to enroll in therapeutic counseling. The Appellate Division modified by striking the provision conditioning continued joint custody of the child with petitioner on her participation in therapeutic counseling. The court erred in conditioning the mother's continued joint custody of the child with petitioner on her participation in therapeutic counseling. A court may include a directive to obtain counseling as a component of a custody or visitation order, but the court does not have authority to order such counseling as a prerequisite to custody or visitation. The court properly determined that there was a sufficient change in circumstances to warrant a determination concerning the best interests of the child. However, although the court's determination that the mother engaged in parental alienation raised a strong probability that she was an unfit parent, the court failed to make explicit findings concerning the relevant factors that must be considered in making a best interests determination in order to resolve the petition and cross petition. Thus, the matter was remitted for specific findings and a hearing, if necessary.

*Matter of Avdic v Avdic*, 125 AD3d 1534 (4th Dept 2015)

### **Mother Willfully Violated Order of Custody**

Family Court determined that petitioner mother willfully violated a stipulated order of custody that, among other things, granted respondent father visitation with the parties' children during the first three weekends of each month. The Appellate Division affirmed. The mother presented evidence at trial that the children did not want to visit the father because they were afraid of him owing to fist fights with his girlfriend, his physical aggression toward the children, and the father's drug use. The mother's contention was rejected that her violation of the order was not willful inasmuch as she was justified in not subjecting the children to such an environment. The father presented evidence that, after conducting an investigation, caseworkers from the Department of Social Services found his home to be safe for the children. Further, the father testified that what the children thought was an illegal drug in his home was actually flavored tobacco from the smoke shop that he owned. The father also provided evidence that the domestic violence to which the mother referred was actually just one incident in 2009 during which he had an argument with his girlfriend, and that, contrary to the mother's testimony, it was the mother's own house that was unfit for the children because of her history of drug use. Given the conflicting nature of the evidence, whether the mother's violation was willful distilled to a credibility determination. The court's determination was not disturbed because there was a sound and substantial basis in the record for its findings.

*Matter of DeJesus v Haymes*, 126 AD3d 1352 (4th Dept 2015)

### **Mother Unfit to be Custodial Parent**

Family Court granted sole legal and physical custody of the parties' child to petitioner father and supervised visitation to respondent mother. The Appellate Division affirmed. The AFC's contention was rejected that the mother's appeal was moot in its entirety because, while the appeal was pending, a new custody proceeding was held and the paternal grandfather was awarded sole legal and physical custody of the subject child. The court found that the mother's judgment was impaired to a degree that made her unfit to be a custodian of the child, a finding that may have enduring consequences for the parties. Therefore, the mother's challenge to the court's determination with respect to her fitness to act as a custodial parent was not moot. Nevertheless, the mother's challenge was rejected on the merits. The mother suffered from bipolar disorder, and schizophrenia with psychosis, she received Social Security disability income, and her mental health hospitalization required her relatives to travel to Puerto Rico to prevent the child from being placed in protective custody. The mother stopped obtaining treatment through psychiatric services and medication because, in her view, such treatment was more hurtful than helpful. Without treatment, there was no basis for the court to conclude that a relapse or further hospitalization would be unlikely. Therefore, there was a sound and substantial basis in the record for the court's determination that, in light of her untreated mental health condition, the mother was unfit to act as a

custodial parent. Moreover, the court properly considered the mother's willingness to reside with the father of her other children as a factor weighing against her fitness to act as a custodial parent. The father of the other children had pleaded guilty to a charge stemming from his sexual abuse of his oldest daughter, and was the subject of an indicated Child Protective Services report for inadequate guardianship because he had attempted to touch his younger daughter inappropriately.

*Matter of Donegan v Torres*, 126 AD3d 1357 (4th Dept 2015)

### **Dismissal of Custody and Visitation Petition Reversed**

On motion of the AFC, Family Court dismissed the father's amended petition seeking to modify an existing custody and visitation order. The Appellate Division reversed, reinstated the amended petition, and remitted the matter to Family Court. To survive a motion to dismiss, a petition seeking to modify a prior order of custody and visitation must contain factual allegations of a change in circumstances warranting modification to ensure the best interests of the child. The amended petition alleged that there had been a change in circumstances inasmuch as the prior order provided that there would be such and further visitation with the subject child as the parties may mutually agree, but respondent mother refused the father all visitation with the child. Therefore, the father made a sufficient evidentiary showing of a change in circumstances to require a hearing.

*Matter of Gelling v McNabb*, 126 AD3d 1487 (4th Dept 2015)

### **Family Court Erred in Failing to Set a Schedule for Supervised Visitation**

Family Court awarded petitioner father sole custody of the subject children, with supervised visitation to respondent mother. The Appellate Division modified, and remitted the matter to Family Court to determine the duration of the mother's visitation. The court did not abuse its discretion in limiting the mother's visitation. There was a sound and substantial basis in the record for the court's determination that the mother filed false reports with Child Protective Services regarding the father and repeatedly violated prior court orders regarding visitation. However, the court set no minimum time period for the mother's monthly visitation, and left the duration of visitation "up to a maximum of eight hours," to be determined solely based on the availability of "any authorized agency that supervised visitation." Consequently, the court erred in failing to set a supervised visitation schedule, implicitly leaving it to the supervisor to determine the duration of each visit. Furthermore, although a court may include a directive to obtain counseling as a component of a custody or visitation order, the court did not have the authority to order such counseling as a prerequisite to custody or visitation. Therefore, the court's order was further modified by vacating the requirement that the mother show substantial compliance with the terms of a prior order concerning drug and alcohol evaluations, mental health evaluations, and a parenting skills training program as a prerequisite for a future application to modify visitation, and by providing instead that the mother comply with those terms as a component of supervised visitation.

*Matter of Ordone v Cothorn*, 126 AD3d 1544 (4th Dept 2015)

### **Award of Visitation to Grandmother Upheld**

Family Court granted petitioner maternal grandmother a minimum of six hours of visitation with the subject children one weekend day per month. The Appellate Division affirmed. Conditions existed in which equity saw fit to intervene. The record supported the court's determination, which was based in part upon the credibility of the witnesses.

*Matter of Richardson v Ludwig*, 126 AD3d 1546 (4th Dept 2015)

### **Award of Custody to Aunt and Uncle Affirmed**

Family Court awarded respondents, the subject child's maternal aunt and uncle, primary physical custody of the child. The Appellate Division affirmed. Petitioner grandmother's contentions were rejected that she was denied due process based on cumulative errors by the court. Specifically, the court properly exercised its discretion in permitting the telephonic testimony of an expert who resided in another state. The grandmother failed to preserve for appellate review her challenge to the medical evaluations of the child by the expert by moving to strike the expert's testimony on the grounds asserted. In any event, the grandmother lacked standing to object to those evaluations as violative of her own due process rights. The allegedly unauthorized evaluations implicated the child's due process rights, as opposed to the due process rights of the grandmother, and generally, a litigant did not have standing to raise rights belonging to another. The grandmother's further contention was rejected that the court erred in failing to find that respondents willfully violated a prior court order. At the time of the alleged violation, the oral direction of the court had not been reduced to a written order, and it was unclear on the record whether respondents were aware of the existence of the oral direction of the court. Although unpreserved for review, the grandmother's contention was without merit that the court erred by not analyzing the matter as a relocation case. Moreover, respondents established the requisite change in circumstances to warrant an inquiry into the best interests of the child given the changes in the child's school schedule since the entry of the prior order, and the extraordinarily acrimonious nature of the parties' relationship. The court properly exercised its power, in the interests of justice, to sua sponte conform the petition to the evidence adduced at the fact finding hearing with respect to post-petition conduct that established a significant change in circumstances. The court properly determined that it was in the child's best interests to award primary physical custody to respondents. The record established that respondents were able to provide for the child's educational and therapeutic needs, as well as her nutritional and health needs. The record further established that respondents were in excellent physical health and were better able to handle the stress involved in raising a child than was the grandmother.

*Matter of Rodriguez v Feldman*, 126 AD3d 1557 (4th Dept 2015)

### **Reversal of Award of Custody to Grandparents**

Family Court awarded petitioners, the paternal grandparents of the subject child, joint legal custody with respondent father, with primary physical custody to the grandparents and visitation to the father and respondent mother. The Appellate Division reversed. While the mother allowed petitioners to have primary physical custody of the child for a prolonged period, there were no other factors to show the existence of extraordinary circumstances. The record established that the child was psychologically attached to both petitioners and the mother, and there was no evidence that removing the child from petitioners' primary custody would result in psychological trauma grave enough to threaten the destruction of the child. The record as a whole supported the conclusion that the child was stressed because of the family conflict, and would not suffer if the mother had custody of the child. Petitioners and the AFC contended that Domestic Relations Law Section 72 (2) did not require a showing that the parent relinquished "all" care and control of the child, and the AFC further contended that cases should not be relied on that predate the 2003 amendment to the statute. However, the standard of extraordinary circumstances remained the same as was set forth in *Bennett v Jeffreys*, 40 NY2d 543. Therefore, the AFC's implicit contention was rejected that Domestic Relations Law Section 72 (2) (b) in any way eased a grandparent's burden of showing extraordinary circumstances, and *Bennett* and cases decided thereafter remained good law. In light of the high standard, and in view of the mother's consistent contact with the child and petitioners' constant communication with the mother and reliance on her permission to make decisions about the child, petitioners did not demonstrate extraordinary circumstances sufficient to deprive the mother of custody of her child.

*Matter of Suarez v Williams*, 128 AD3d 500 (4th Dept 2015)

### **Court Erred in Granting Parties Joint Custody Given Evidence of Father's Acts of Domestic Violence**

Family Court granted the parties joint custody of their child, and denied the mother's request to relocate with the child to California. The Appellate Division modified. Inasmuch as the case involved an initial custody determination, it could not properly be characterized as a relocation case to which the application of the factors set forth in *Matter of Tropea v Tropea*, 87 NY2d 727, 740-741 [1996] need be strictly applied. A court could consider relocation as part of a best interests analysis with respect to a custody determination, but it was one factor among many. Family Court's determination that the child's best interests would be served by awarding joint custody to the parties lacked a sound and substantial basis in the record. Where, as here, domestic violence was alleged, the court must consider the effect of such domestic violence upon the best interests of the child. The evidence of the father's acts of domestic violence demonstrated that he possessed a character that was ill-suited to the difficult task of providing his young child with moral and intellectual guidance, and that the best interests of the child were served by awarding the mother sole legal custody and primary physical custody, with visitation to the father. However, the court properly denied the mother's request to relocate with the child to California. While no basis was discerned for disturbing the parenting schedule in light of the modification of custody, the order was further modified to direct that the exchanges of the child occur at neutral

locations.

*Matter of Jacobson v Wilkinson*, 128 AD3d 1335 (4th Dept 2015)

**Award of Sole Legal and Primary Physical Custody to Mother Reversed Where Finding that Father Failed to Provide Child with Medication Was Against the Weight of the Evidence.**

Family Court modified a prior consent order by awarding respondent mother sole legal and primary physical custody of the subject child and visitation to the father. The Appellate Division reversed, granted the father sole legal and primary physical custody of the child, granted visitation to the mother, and remitted the matter to Family Court to fashion an appropriate visitation schedule. The court's finding that the father failed to provide the child with required medication was against the weight of the evidence. The father did not dispute that he questioned certain diagnoses and was resistant to giving the child certain medication, especially when multiple pills were sent with the child in a plastic baggie without labels. The father adamantly and consistently testified, however, that he always gave the child the required medication. The court's determination of custody lacked a sound and substantial basis in the record. Aside from the finding that the father failed to give the child required medication, the court found in favor of the father on all other relevant factors. The evidence established that the father was much better able to manage the child's behavior. The mother had resorted to physical discipline in order to control the child when he had anger management issues. As a result, there were at least two indicated child protective services reports against the mother. Although the mother had been the primary residential parent for the past two years, the father was better able to address the child's behavioral issues.

*Matter of Gilman v Gilman*, 128 AD3d 1387 (4th Dept 2015)

**Award of Primary Physical Placement to Father Affirmed**

Family Court granted petitioner father primary physical placement of the subject children. The Appellate Division affirmed. The Father established the requisite change in circumstances by showing that the mother's residence had become a harried and chaotic environment that did not provide the subject children with the focused attention and structure they needed. There was a sound and substantial basis in the record to support the court's determination that it was in the children's best interests to award primary physical placement to the father.

*Matter of Higgins v Higgins*, 128 AD3d 1396 (4th Dept 2015)

**Affirmance of Award of Sole Legal and Primary Physical Placement to Father**

Family Court modified a prior custody order by, among other things, awarding sole legal custody and primary physical placement of the parties' child to petitioner father. The Appellate Division affirmed. Respondent mother's contention was rejected that she

was denied effective assistance of counsel inasmuch as she did not demonstrate the absence of strategy or other legitimate explanations for counsel's alleged shortcomings. Furthermore, Family Court did not abuse its discretion in denying her attorney's request for an adjournment and in holding the hearing in her absence. The mother was aware of the hearing date, and her attorney's vague claim that she was unable to attend the hearing due to winter weather conditions was unsupported by any detailed explanation or evidence from the mother.

*Matter of Vanskiver v Clancy*, 128 AD3d 1408 (4th Dept 2015)

### **Award of Primary Physical Custody to Mother Affirmed**

Family Court awarded petitioner mother primary physical custody of the parties' child. The Appellate Division affirmed. The father's appeal from an order denying his motion for leave to reargue and renew his opposition to Family Court's decision was dismissed to the extent that the Court denied that part of the father's motion for leave to reargue inasmuch as no appeal lies from such an order. The order denying the father's motion was otherwise affirmed inasmuch as the facts presented by the father in seeking leave to renew would not change the prior determination. Family Court properly determined that there was a change in circumstances based on, among other things, the continued deterioration of the parties' relationship. Family Court's determination awarding the mother primary physical custody was in the child's best interests.

*Matter of Mehta v Franklin*, 128 AD3d 1419 (4th Dept 2015)

### **Affirmance of Award of Primary Physical Custody to Father Where Mother's Residence Unsanitary and Unsafe, and Child Exposed to Instances of Sexual Abuse**

Family Court awarded respondent father primary physical custody of the subject child, and dismissed the mother's family offense petition. The Appellate Division affirmed. Family Court properly determined that the father established the requisite change in circumstances to warrant an inquiry into whether the best interests of the child would be served by modifying the existing custody arrangement. The father presented evidence establishing that the conditions in the mother's residence were unsanitary and unsafe for the child and that the child had been exposed to instances of sexual abuse while under the mother's care and supervision. According due deference to the court's assessment of witness credibility, the court's determination to award primary physical custody of the child to the father was supported by a sound and substantial basis in the record. The court did not err in dismissing the mother's family offense petition and refusing to issue an order of protection. The mother contended for the first time on appeal that the father's actions constituted the offense of menacing in the third degree and disorderly conduct, and therefore, these contentions were not considered. According due deference to the court's credibility determination, the mother failed to establish by a fair preponderance of the evidence that the father engaged in acts constituting harassment in the second degree.

*Matter of Voorhees v Talerico*, 128 AD3d 1466 (4th Dept 2015)

### **Award of Custody to Nonparent Affirmed**

Family Court awarded custody of the subject children to respondent, a nonparent friend of petitioner father's family, and set forth a schedule for petitioner father's supervised visitation with the children. The Appellate Division affirmed. In 2008, during a neglect proceeding against petitioner with respect to the four subject children, petitioner asked respondent to take custody of the children. Respondent then petitioned for custody of the children. Family Court issued an order pursuant to Family Court Act Article 6 that, among other things, granted respondent's petition and awarded custody of the children to respondent, with visitation to petitioner. Upon the father's consent, the court also issued an order pursuant to Family Court Act Article 10 that contained a finding that the father had neglected the children, placed the father under the supervision of DSS, and ordered the father's visitation to be supervised. Petitioner's contention was rejected that respondent failed to meet her burden of proving that extraordinary circumstances existed to warrant respondent's continued custody of the children. The record established that, in July 2008, petitioner voluntarily surrendered the children to respondent, that in 2009 petitioner made an application to regain custody of the children but his petition was dismissed for failure to prosecute. Petitioner made no further efforts to regain custody of the children until April 2013, when he filed the instant petition. While the children were in respondent's custody, petitioner sporadically attended visitation with the children and, when he did so, behaved inappropriately. Moreover, petitioner admitted that he did not know the children's birth dates, ages, or grade levels at school. Where, as here, the prior order granting custody to a nonparent was made upon the consent of the parties and the nonparent has met his or her burden of demonstrating that extraordinary circumstances exist, the burden shifted to the parent to demonstrate a change in circumstances to warrant an inquiry into the best interests of the children. Petitioner failed to demonstrate a change in circumstances. Even assuming, arguendo, that petitioner demonstrated a change in circumstances, the record established that respondent was more fit to care for the children, and that he continuity and stability of the existing custodial arrangement was in the children's best interests.

*Matter of Wilson v Hayward*, 128 AD3d 1475 (4th Dept 2015)

### **Award of Sole Legal Custody to Father Affirmed Where Mother Likely to Undermine Child's Relationship With Father**

Family Court awarded sole legal and primary physical custody of the subject child to petitioner father, granted respondent mother final decision-making authority over medical determinations if the parties are unable to agree, and set a visitation schedule that divided the parties' parenting time into specific blocks of time. The Appellate Division affirmed. Family Court concluded that both parties' testimony was partisan to a fault, unconvincing, lacking in credibility, and significantly devoid of many details, but further concluded that the father was the more stable parent and that the mother was

likely to undermine the subject child's relationship with the father. It was well settled that a concerted effort by one parent to interfere with the other parent's contact with the child was so inimical to the best interests of the child as to, per se, raise a strong probability that the interfering parent was unfit to act as custodial parent. Inasmuch as no other factor strongly favored either party, and the court's custody determination, which was based upon its first-hand assessment of the credibility of the witnesses, had a sound and substantial basis in the record, it would not be disturbed. The court fully considered the impact of the evidence concerning acts of domestic violence by both parties in making its determination.

*Matter of LaMay v Staves*, 128 AD3d 1485 (4th Dept 2015)

### **Reversal of Award of Sole Legal Custody to Father**

Family Court modified a prior order by granting sole legal custody of the parties' daughter to respondent father. The Appellate Division reversed and remitted the matter to Family Court for a new hearing on the best interests of the child. Family Court's determination with respect to custody lacked a sound and substantial basis in the record. A custody determination should be made only after a full and fair hearing at which the record is fully developed. Here, the court made its determination following a hearing at which, apart from an in camera interview of the child, the mother was the sole witness. Although the record contained sufficient evidence to establish that the relationship of the parties had deteriorated to such an extent that the existing joint custody arrangement was no longer feasible, it did not contain sufficient evidence supporting the award of sole legal custody to the father. Indeed, inasmuch as the mother's testimony raised significant questions about the father's parental fitness and the father did not present any evidence, the father failed to establish that it was in the best interests of the child to award sole custody to him. Moreover, the court failed to make any findings concerning the factors that must be considered in making a best interests determination. The court properly denied the mother's motion to remove the AFC. The record established that the AFC properly advocated for the wishes of her client.

*Matter of Mills v Rieman*, 128 AD3d 1486 (4th Dept 2015)

### **Court Did Not Err in Admitting Evidence Concerning Father's Criminal History and Conduct While Incarcerated**

Family Court modified a prior order by awarding respondent mother sole legal and physical custody of the parties' child. The Appellate Division affirmed. Family Court did not err in admitting evidence concerning petitioner father's criminal history and conduct while incarcerated. Inasmuch as a parent's criminal history may militate against an award of custody, that evidence was relevant and properly admitted. In addition, the record established that the court did not place an undue emphasis on the father's past criminal convictions or on his conduct while incarcerated. There was a sound and substantial basis in the record to support the court's determination that it was in the

child's best interests to award sole custody to the mother. Thus, that determination would not be disturbed.

*Matter of Springstead v Bunk*, 128 AD3d 1516 (4th Dept 2015)

### **Court Erred in Sua Sponte Directing that Father Have No Further Contact or Visitation With Child**

Family Court sua sponte directed that respondent father was to have no further contact or visitation with the parties' child. The Appellate Division reversed and remitted. The mother filed an amended petition seeking an order directing that the father's visitation with the subject child be supervised by an appropriate agency. Family Court erred in sua sponte granting relief that was not requested by the parties or the Attorney for the Child. The record established that the parties had no notice that such an order might be issued, and they were not afforded an opportunity to address the necessity for such an order.

*Matter of Majuk v Carbone*, 129 AD3d 1485 (4th Dept 2015)

### **Agreement, Signed Only By Mother, Simply a Factor for Court to Consider in Making Its Ultimate Determination**

Supreme Court found that a change of circumstances had occurred since the 2007 order, but concluded that it was in the child's best interests to continue joint custody with primary residency with respondent mother. The Appellate Division affirmed. In late 2012, the mother's living situation became uncertain, and petitioner father agreed to have the child live with him. The father prepared an affidavit reciting that the father would have "primary custody" and the child would stay with the father during the week and the mother on weekends. The mother signed the affidavit. In May 2013, the mother requested that the child be returned to her for primary residency, and the father denied the request. The father filed a petition seeking to modify the 2007 order and grant him primary residency of the child, while the mother filed a petition seeking to enforce the 2007 order. The father's contention was rejected that the court erred in not giving effect to the parties' 2012 agreement and that the mother was required to show a change in circumstances from the time that the agreement was signed by the mother. The agreement, signed only by the mother and not reduced to an order, was merely an informal arrangement and simply a factor for the court to consider in making its ultimate determination. The court's determination that the best interests of the child would be served by granting primary residency to the mother was supported by a sound and substantial basis in the record.

*Matter of Lugo v Hamill*, 129 AD3d 1532 (4th Dept 2015)

### **Award of Sole Legal and Primary Physical Custody Reversed Upon AFC's Submission of New Information**

Family Court awarded petitioner father sole legal and primary physical custody of the parties' children and granted visitation to respondent mother. The Appellate Division reversed and remitted. The AFC submitted new information to the Appellate Division that the children had been living with the mother in Maryland since December 2014, apparently upon the father's consent. In addition, the AFC and the mother noted that the father's living conditions had changed. The Appellate Division court take notice of new facts and allegations to the extent they indicated that the record before it was no longer sufficient for determining the father's fitness and right to sole legal and primary physical custody of the children. Thus, the matter was remitted for an expedited hearing on the issue whether the alleged change in circumstances affected the best interests of the children. In light of this determination, the Court did not consider the contentions of the mother, or the remaining contention of the AFC that the children were denied effective assistance of counsel because their trial attorney did not file a notice of appeal.

*Matter of Gunn v Gunn*, 129 AD3d 1533 (4th Dept 2015)

### **Father's Contention Regarding Visitation With Stepchild Moot**

Family Court denied the father's petitions for visitation with his two former stepchildren, for modification of the visitation order with respect to his child with respondent mother, and for violation of visitation orders. The Appellate Division dismissed the appeal insofar as it concerned the older stepchild, and affirmed. The father's contention regarding visitation with the older stepchild was moot because he had attained 18 years of age. The father lacked standing to seek visitation with the younger stepchild. The court properly determined that the father failed to show a change in circumstances sufficient to warrant modification of the visitation order and failed to establish that the mother willfully violated a clear mandate of the visitation orders.

*Matter of Rosborough v Alatawneh*, 129 AD3d 1537 (4th Dept 2015)

### **Father Not Required to Prove Substantial Change in Circumstances**

Family Court awarded respondent father custody of the parties' child. The Appellate Division affirmed. This proceeding involved an initial court determination with respect to custody and, although the parties' informal arrangement was a factor to be considered, the father was not required to prove a substantial change in circumstances in order to warrant a modification. The court's determination to award custody of the child to the father with liberal visitation to the mother was supported by a sound and substantial basis in the record.

*Matter of Denise v Denise*, 129 AD3d 1539 (4th Dept 2015)

### **Appeals Rendered Moot**

Family Court dismissed petitions where the parties sought, among other things, an

order resolving custody and visitation with respect to the subject child. The Appellate Division dismissed the appeals, having taken judicial notice of the fact that, while these appeals were pending, the parties filed further petitions seeking modification of the orders on appeal. An order resolving custody and visitation issues with respect to the subject child was thereafter entered upon consent of the parties, rendering these appeals moot. The exception to the mootness doctrine did not apply.

*Matter of Smith v Cashaw*, 129 AD3d 1551 (4th Dept 2015)

### **Award of Sole Legal and Physical Custody to Mother Affirmed Notwithstanding Preference of 13-Year-Old Child to Live With Father**

Defendant father and the appellate AFC appealed from a Supreme Court order that awarded plaintiff mother sole legal and physical custody of the subject 13-year-old child, and visitation to the father. In a separate order appealed by the father, the court directed the father to pay counsel fees to the mother's attorney in the amount of \$44,977.34, directed the father to pay sanctions in the amount of \$7,000, and directed the father's attorney to pay sanctions in the amount of \$3,000. The Appellate Division affirmed the custody and visitation order, and modified the order pertaining to counsel fees and sanctions. Supreme Court improperly curtailed the father's cross-examination of the court-appointed expert; erred in prohibiting the father from calling the child's therapist as a rebuttal witness; and erred in admitting certain EZ-Pass records because a proper foundation for their admission was not provided by someone with personal knowledge of the maker's business practices and procedures, and there was no indication that the records were certified to comply with CPLR 4518 pursuant to CPLR 3122-a. However, those errors were harmless inasmuch as the excluded evidence would not have had a substantial influence on the outcome of the case, and the errors did not adversely affect a substantial right of the father. Furthermore, the court did not err in admitting in evidence the reports of the court-appointed expert pursuant to 22 NYCRR 202.16 (g) (2). Although the reports were not submitted under oath, as required by the regulation, when the expert subsequently was called, she testified under oath and was available for cross-examination. The father's and the appellate AFC's contention was rejected that the court's custody determination was not in the child's best interests and that the court failed to give appropriate weight to the child's desire to live with the father. The court's determination that it was in the best interests of the child to remain in the custody of the mother was supported by a sound and substantial basis in the record. Because the wishes of the child were not determinative, no error was perceived in how the court addressed that factor. The appellate AFC's contention was rejected that the AFC at the trial level did not properly present the child's wishes to the court. The AFC at the trial level fulfilled her representational obligations by voicing the child's wishes directly to the court without recommending any finding to the contrary. The court held two *Lincoln* hearings, and the AFC did not prevent the child from voicing his wishes to the court. There was no basis to disturb the visitation schedule fashioned by the court. The court abused its discretion in awarding sanctions because the conduct of the father and his attorney was not frivolous. Counsel fees were reduced due to a mathematical error. The dissent would have modified the custody and

visitation order by awarding sole custody to the father with visitation to the mother because the court's determination lacked a sound and substantial basis in the record. Most glaringly, according to the dissent, the court failed to give sufficient weight to the child's preference to live with the father. Moreover, the dissent noted that the trial AFC's inadequate representation of the child at the trial level further justified reversing the court's custody determination. The dissent agreed with the majority's resolution of the appeal of the order directing payment of counsel fees and sanctions.

*Sheridan v Sheridan*, 129 AD3d 1567 (4th Dept 2015)

### **Former Same-Sex Partner of Respondent Lack Standing to Seek Custody of, or Visitation With, Respondent's Child**

Petitioner and respondent were former same-sex partners. Family Court dismissed the petition seeking custody and visitation with the son of the respondent on the ground that petitioner was not married to respondent and did not adopt the child, thus petitioner lacked standing to seek custody of, or visitation with, the child. The AFC appealed. The Appellate Division affirmed. The Court of Appeals recently reiterated that a nonbiological, nonadoptive parent did not have standing to seek visitation when a biological parent who was fit opposed it, and that equitable estoppel did not apply in such situations even where the nonparent had enjoyed a close relationship with the child and exercised some control over the child with the parent's consent. Parentage under New York law derived from biology or adoption, that the decision of the Court of Appeals in *Matter of Alison D. V Virginia M.*, 77 NY2d 651, in conjunction with second-parent adoption, created a bright-line rule that promoted certainty in the wake of domestic breakups otherwise fraught with the risk of disruptive battles over parentage as a prelude to further potential combat over custody and visitation. Furthermore, petitioner failed to sufficiently allege any extraordinary circumstances to establish her standing to seek custody as a nonbiological, nonadoptive parent.

*Matter of Barone v Chapman-Cleland*, 129 AD3d 1578 (4th Dept 2015)

### **Father's Custody Modification Petition Properly Denied Where Abusive Former Boyfriend No Longer Resided With Mother or Had Relationship With Her**

Family Court denied the father's petition to modify a prior custody order that awarded sole legal custody and primary physical custody of the parties' child to respondent mother, except to the extent that the father was awarded additional visitation. The Appellate Division affirmed. The court properly determined that there was a change in circumstances based on, among other things, incidents of domestic violence in the mother's household. However, the court did not err in determining that the existing custodial arrangement was in the child's best interests. The father acknowledged at the hearing that the sole basis for his modification petition was that the mother was the victim of domestic abuse at the hand of her former boyfriend, with whom she had lived for several years. According to the father, the incidents of domestic violence in the mother's home rendered it unsafe for the child to reside there. The evidence at the

hearing established, however, that the mother filed criminal charges against her abusive former boyfriend and obtained an order of protection against him. As a result, he no longer resided with the mother and had no relationship with her. The court's refusal to modify the existing arrangement was supported by a sound and substantial basis in the record.

*Matter of Schieble v Swantek*, 129 AD3d 1656 (4th Dept 2015)

### **Mother's Persistent and Pervasive Pattern of Alienating Child From Father Likely to Result in Substantial Risk of Imminent, Serious Harm to Child**

Family Court awarded sole custody of the subject child to petitioner father, with visitation to respondent mother, and ordered the mother to pay counsel fees to the father's attorney. The Appellate Division affirmed. The mother's contention was rejected that the AFC violated her ethical duty because the AFC advocated for a result that was contrary to the child's expressed wishes in the absence of any justification for doing so. The evidence supported the court's conclusion that to follow the child's wishes would be tantamount to severing her relationship with her father, and that result would not be in the child's best interests. The mother's persistent and pervasive pattern of alienating the child from the father was likely to result in a substantial risk of imminent, serious harm to the child, and the AFC acted in accordance with her ethical duties. The mother's contentions with respect to her motion to replace the AFC were not before the Appellate Division because the court denied the motion in a prior order from which the mother did not appeal. Furthermore, the court denied the motion on the ground that the mother's motion did not comply with CPLR 2214 (b), and thus, the court's remaining discussion was dicta. On appeal, the mother confined her contentions to the court's remaining discussion concerning the propriety of the actions of the AFC. Inasmuch as no appeal lied from dicta, the mother's contentions with respect to her motion to replace the AFC were not before the Appellate Division. The court's determination to award custody of the subject child to the father was supported by a sound and substantial basis in the record. The mother interfered with the father's relationship with the child by, among other things, blatantly and repeatedly violating the court's directive not to discuss the litigation with the child, attempting to instill in the child a fear of the father, and encouraging the child to medicate herself before going to visit the father. The mother's contention was rejected that the father's prior domestic violence toward the mother required that she have primary custody of the child. There was no evidence that the domestic violence was anything other than an isolated incident with no negative repercussions on the child's well-being. Indeed, the domestic violence occurred before the child was born.

*Matter of Viscuso v Viscuso*, 129 AD3d 1683 (4th Dept 2015)

### **Order Reversed Where Family Court Did Not Have Jurisdiction**

Family Court granted sole custody of the subject child to petitioner father, and suspended the visitation rights of respondent mother. The Appellate Division reversed

and granted the mother's motion to dismiss. Pursuant to an order of custody issued by a Texas court, the father had the exclusive right to designate the primary residence of the child. The father, who was in the military, thereafter relocated with the child to Fort Drum in New York, where he was stationed. In May 2013, a petition was filed to modify the custody order by suspending the mother's visitation rights. In August 2013, the mother moved to dismiss the petition for lack of jurisdiction, which the court denied. In October 2013, the court communicated with a Texas court, which declined jurisdiction. In April 2014, the mother indicated by telephone that she would not be able to appear personally for the hearing because of financial constraints. The court disconnected the call, and granted the father's motion for a default order based on the mother's statements. Because the purported withdrawal of counsel was ineffective, the order entered by the court was improperly entered as a default order and appeal therefrom was not precluded. Furthermore, the court erred in denying the mother's motion to dismiss the petition. Texas had exclusive, continuing jurisdiction pursuant to Domestic Relations Law Section 76-a at the time of the filing of the petition, and the father's allegations in the petition were insufficient for the court to exercise temporary emergency jurisdiction pursuant to Domestic Relations Law Section 76-c. Although the court later acquired jurisdiction when it communicated with the Texas court, at the time the court issued its order denying the mother's motion to dismiss, it did not have temporary emergency jurisdiction and had not complied with the requirements of section 76-c.

*Matter of Bretzinger v Hatcher*, 129 AD3d 1698 (4th Dept 2015)

### **Order Directing Custody to Remain With Mother Reversed**

Family Court directed that respondent mother continue to be the "parent of primary custody." The Appellate Division reversed and remitted for a determination, including specific findings, whether relocation was in the best interests of the child. The court erred in designating the mother the parent of primary residence, which implicitly condoned the mother's relocation to Florida. On remittal, the court must make findings regarding the relevant factors that must be considered in making a relocation determination.

*Matter of Lapoint v Pellicciotti*, \_\_\_ AD3d \_\_\_ (4th Dept 2015)

### **Appeals Not Rendered Moot Because Child No Longer Wished to Change Schools**

Supreme Court, among other things, granted that part of defendant father's motion seeking to change the parties' child's school. The Appellate Division modified by vacating the ordering paragraph authorizing the change in schools. Contrary to the contention of the AFC, the order was not moot because the child no longer wished to change schools and his parents supported his wishes. The order was adverse to the interests of the mother such that her rights would be adversely affected by the determination. The court erred in granting that part of the motion seeking the change in

schools without first conducting a hearing and considering additional extrinsic evidence on the issue whether the parties intended a change in the child's school enrollment to be contemporaneous with his change in primary residence. The court did not err in granting that part of the motion seeking to modify the access schedule. Giving particular weight to the then 16-year-old child's wishes and the adverse effect that the access schedule would have on his time with his brother, the court properly determined that there had been a change in circumstances warranting an inquiry into the best interests of the child. The record established that the adjusted schedule was in the child's best interests.

*Matter of Gardner v Korthals*, \_\_\_ AD3d \_\_\_ (4th Dept 2015)

### **Sole Custody to Mother Affirmed**

Family Court denied respondent father's petition for enforcement of a prior custody order and granted the mother's petition for modification of that order by awarding her custody and primary physical residency of the parties' child. The Appellate Division affirmed. The court properly denied the father's petition, pursuant to which the father sought return of the child from Monroe County, where she was relocated by the mother, to Saratoga County, where the child resided at the time of the custody order and where the order presumed the child would live. The court erred in failing to analyze this matter as a relocation case, but the record was sufficient for the Appellate Division to do so. The mother demonstrated that the relocation was in the child's best interests because the mother's move to Monroe County economically enhanced the lives of the mother and child. Without the relocation, the mother, who was the child's primary caregiver, would have been living in poverty, without a stable home. Additionally, the child was doing well emotionally, socially, and educationally, and was happy with the current arrangement. Further, there was no indication that the relocation had been detrimental to the child relationship with the father. Given the acrimonious relationship of the parties and their inability to communicate, the court did not err in granting the mother sole custody.

*Matter of Moredock v Conti*, \_\_\_ AD3d \_\_\_ (4th Dept 2015)

## **FAMILY OFFENSE**

### **Petition Properly Dismissed For Lack of Jurisdiction**

Family Court dismissed the father's petition for lack of jurisdiction. The Appellate Division affirmed. The father conceded that respondent mother moved with the children to Florida more than six months before the filing of the petition, and there was no evidence that they ever returned to New York. The record established that the children no longer had a significant connection with New York and that substantial evidence was no longer available in this State concerning the children's care, protection, training, and personal relationships, and the father failed to submit any evidence to the contrary.

*Matter of Brown v Heubusch*, 124 AD3d 1396 (4th Dept 2015)

### **Order of Protection Reversed Where Finding Based on Violation of Unconstitutional Statute**

Family Court determined that respondent father committed the family offense of aggravated harassment in the second degree against petitioner mother. The Appellate Division reversed. The Court of Appeals determined that Penal Law Section 240.30 (1), which proscribes communications made in a manner likely to cause annoyance or alarm was unconstitutionally vague and overbroad. Thus, the statute could not serve as the basis for a finding that respondent committed a family offense.

*Matter of Fisher v Hofert*, 126 AD3d 1391 (4th Dept 2015)

### **Stay Away Order of Protection Affirmed**

Family Court issued an order of protection upon a finding that respondent willfully violated a prior order of protection issued in favor of petitioner directing respondent, among other things, to refrain from forcible touching. The Appellate Division affirmed. Petitioner met her burden of establishing that respondent was aware of the terms of the prior order of protection, and that he willfully violated it. Respondent's contention was unpreserved for review that Family Court improperly considered testimony regarding an incident not alleged in the petition, and the record did not support that contention in any event. Family Court did not abuse its discretion in issuing a stay away order of protection.

*Matter of Burley v Burley*, 128 AD3d 1421 (4th Dept 2015)

### **Dismissal Proper Where Petition Failed to Specify When Alleged Incidents Occurred**

Family Court granted respondent's motion to dismiss the petition, without prejudice, pursuant to CPLR 3211 (a) (7). The Appellate Division affirmed. Because the petition failed to specify when the alleged incidents occurred, Family Court was unable to

ascertain whether the allegations were the subject of a December 2011 hearing after which Family Court dismissed the petition for failure to prove the allegations by a preponderance of the evidence. Any allegations concerning events that were the subject of the 2011 hearing were barred by collateral estoppel, and thus the petition would have been properly dismissed to that extent. The Appellate Division was unable to review the propriety of Family Court's decision because petitioner failed to include in the record on appeal either the petition that was the subject of the 2011 hearing or the transcript of that hearing. Petitioner, as the appellant, submitted this appeal on an incomplete record and must suffer the consequences.

*Matter of Keicher v Scheifla*, 129 AD3d 1500 (4th Dept 2015)

## **JUVENILE DELINQUENCY**

### **Restrictive Placement Proper**

Family Court adjudicated respondent to be a juvenile delinquent based upon the finding that he committed acts that, if committed by an adult, would constitute the crimes of rape in the first degree, criminal sexual act in the first degree, and sexual abuse in the first degree. Respondent was placed in the custody of the New York State Office of Children and Family Services for a period of three years. The Appellate Division affirmed. The court properly determined that respondent required a restrictive placement. The court properly considered the seriousness of the crime, respondent's need for therapy in conjunction with his failure to admit to his actions in the instant case, respondent's lack of support and adequate supervision at home, the need to protect the community in light of respondent's aggressive and inappropriate sexual behavior towards others at school, and his series of mental hygiene arrests. Thus, the order of disposition reflected an appropriate balancing of the needs of respondent and the safety of the community.

*Matter of Amir S.*, 124 AD3d 1391 (4th Dept 2015)

### **JD Petitions Properly Dismissed in the Interests of Justice**

Family Court dismissed the juvenile delinquency petitions against respondent. The Appellate Division affirmed. Contrary to petitioner's contention, the court neither exceeded its authority nor abused its discretion in dismissing the petitions. The record supported the court's determination, upon its examination and consideration of the relevant statutory factors, that a finding of delinquency or a continuation of the proceeding would result in injustice.

*Matter of Cory J.S.*, 125 AD3d 1272 (4th Dept 2015)

### **Court Erred in Failing to Consider Least Restrictive Available Alternative**

Family Court adjudicated respondent to be a juvenile delinquent based upon the finding that he committed acts that, if committed by an adult, would constitute the crimes of petit larceny and criminal possession of stolen property in the fifth degree. Respondent was placed in the custody of the Department of Social Services for a period of twelve months. The Appellate Division modified by vacating the disposition. The evidence presented at the dispositional hearing and the predispositional and probate update reports prepared in conjunction with that hearing established that respondent's home environment was toxic, and he suffered from mental health issues that required treatment. The update to the original report indicated that respondent was staying with a family friend who had known him since birth, and that the friend had petitioned for custody of respondent, and that there had been no new arrests during that time. The update also indicated that the friend was able to devote significant time to supervising respondent, and that the friend resided with a woman who managed a residential

home. Both the family friend and the woman with whom he resided testified at the dispositional hearing that they could help with respondent's supervision. Therefore, the court erred in failing to consider the least restrictive available alternative in fashioning an appropriate dispositional order, and the matter was remitted for a new dispositional hearing.

*Matter of Jacob A.T.*, 126 AD3d 1550 (4th Dept 2015)

### **Order Reversed, Petition Dismissed Where Respondent's Admission Was Defective**

Family Court placed respondent in the custody of the Commissioner of Social Services for a period of one year. The Appellate Division reversed and dismissed the petition. Respondent's admission to acts that, if committed by an adult, would constitute the crime of forcible touching was defective because Family Court failed to comply with Family Court Act Section 321.3 (1). Respondent's admission was defective inasmuch as the court failed to ascertain that respondent and his parents were aware of all possible dispositional alternatives, such as the possibility of a conditional discharge or an extension of placement. Because the period of respondent's placement had expired, the petition was dismissed.

*Matter of Johnathan B.M.*, 129 AD3d 1517 (4th Dept 2015)

## **PATERNITY**

### **Court Erred in Applying Res Judicata to Claims in Cross Petition**

Family Court dismissed petitioner's cross petition seeking a determination that he was the biological father of the subject child. The Appellate Division reversed and remitted. Respondent signed an acknowledgment of paternity with respect to the child when the child was born in 2000. DNA testing, however, later established that petitioner was in fact the child's biological father. Petitioner filed a custody petition and, by default order, the court awarded petitioner custody of the child. Respondent subsequently filed a petition seeking modification of that order to permit visitation of the child with respondent and the half brother of the child, and petitioner filed a cross petition seeking an order vacating respondent's acknowledgment of paternity, determining that petitioner was the child's biological father, and directing that an amended birth certificate be filed. The court erred in applying the doctrine of res judicata to petitioner's claims in the cross petition. In matter concerning filiation, it was the child's best interests which were of paramount concern. It was in the child's best interests to permit petitioner to be heard on his claims in the cross petition. Petitioner had been the child's legal, full-time caregiver and provider since 2011, and respondent also recognized petitioner as the child's biological father.

*Matter of Frost v Wisniewski*, 126 AD3d 1305 (4th Dept 2015)

## PERSON IN NEED OF SUPERVISION

### Family Court Erred in Granting Respondent's Motion and Finding Petitioner in Contempt of Court Without Conducting Hearing

Family Court found petitioner in contempt for failing to comply with an order extending the placement of respondent through June 2014. The Appellate Division reversed and remitted the matter to the court for a hearing. The order extending the placement provided that respondent, who was adjudicated a person in need of supervision in June 2010, was not to be discharged from foster care without the permission of the court. Respondent threatened his foster mother in early January 2014 and, when the police arrived, he threatened them as well, resulting in his arrest and incarceration. When respondent was released from incarceration, petitioner placed him in an emergency homeless shelter for teens and filed a petition seeking to terminate his placement in foster care pursuant to Family Court Act Section 756 (a) (ii) (1). Respondent, who was 18 years old at the time, moved to hold petitioner in contempt. The court erred in granting the motion and finding petitioner in contempt of court without conducting a hearing. To sustain a civil contempt, a lawful judicial order expressing an unequivocal mandate must have been in effect and disobeyed; the party to be held in contempt must have had knowledge of the order; and prejudice to the rights of a party to the litigation must be demonstrated. Respondent established those elements. However, petitioner raised a valid defense, i.e. its inability to comply with the order. Petitioner submitted evidence that it contacted numerous foster homes and group homes, and none would accept respondent because of his past violent and disruptive behavior while in foster care. Respondent had a history of not following the rules and using drugs. The agency that eventually accepted respondent after the finding of contempt had denied acceptance at the time of the motion. Respondent's mother would not take him back into her home, and she told the caseworker that there were no friends or family willing to accept respondent. Notably, petitioner did not simply ignore the order when it became apparent that it was unable to comply. Instead, it filed a petition seeking to terminate respondent's placement in foster care. The instant case was distinguishable from *McCain v Dinkins*, 84 NY2d 216 (1994). In the instant case, petitioner argued that it was respondent's own conduct that prevented petitioner from complying with the order. Petitioner was entitled to a hearing to present any such defense.

*Matter of Andrew B.*, 128 AD3d 1513 (4th Dept 2015)

## **TERMINATION OF PARENTAL RIGHTS**

### **Parental Rights Properly Terminated on Ground of Permanent Neglect**

Family Court terminated respondent father's parental rights with respect to respondents' daughter, and terminated respondent mother's parental rights with respect to respondents' daughter and the mother's two sons. The Appellate Division affirmed. Petitioner met its burden of proving by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and her children. Petitioner developed a service plan for the mother that included parenting classes, supervised visitation, assistance by a parent aide, domestic violence counseling, couples counseling, mental health counseling and several home visits. Petitioner engaged in meaningful efforts with respect to the mother's unstable housing situation, but she was not receptive. Indeed, the mother continued to move in and out of the father's house, which was unsuitable for the children because of its overall filth and the presence of several large, aggressive dogs. Moreover, the mother failed to plan adequately for the future of her children, although physically and financially able to do so. Although the mother completed two domestic violence programs, she admitted that she continued to engage in acts of domestic violence against the father. She also participated in other counseling services, but failed to make progress. The mother conceded that her living arrangements were unstable, and that she moved in and out of the father's house about "fifty times," despite its unsuitability for her children. The evidence showed that the mother had some income, and was able to apply for additional support. Although the mother completed a parenting class and regularly attended supervised visits with her children, those visits had to be reduced from two 20-minute visits per week to a single, hour-long visit per week, and yet the mother continued to be overwhelmed by her three children, resulting in at least one instance of physical violence against one of the children. Although unpreserved for review, the father's contention was without merit that the court violated his due process rights by conducting the fact-finding and dispositional hearings in his absence. A parent's right to be present for fact-finding and dispositional hearings was not absolute. The father had been made aware of the scheduled fact-finding hearing but failed to appear, despite an explicit warning from the court that the hearing would proceed in his absence. Although the father told his attorney and a caseworker that he did not appear because he had a flat tire, he told his mother that he did not appear because he overslept. The father's attorney fully represented his interests at the fact-finding hearing and thus the father failed to demonstrate that he suffered any prejudice as a result of his absence. Similarly, the father's attorney represented his interests at the dispositional hearing and the father failed to demonstrate that he suffered any prejudice as a result of his absence. Petitioner met its burden of proving by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the father and his child. Despite petitioner's efforts, the father failed to participate meaningfully in counseling, failed to attend service plan review meetings, rarely used his full visitation time, and, although he made some alterations to his home, failed to make it suitable for children. The father failed to plan adequately for the future of the child. He refused to attend individual counseling sessions, requested that his

weekly visits be reduced to biweekly visits because he was “too busy,” and ultimately, attended only five of 24 scheduled visits. The father also failed to contact his child’s daycare for progress reports or attend service plan review meetings, among other things. Despite no apparent physical or financial limitations, the father failed to remedy the unsuitable living conditions of his home.

*Matter of Dakota H.*, 126 AD3d 1313 (4th Dept 2015)

### **Termination of Parental Rights on Ground of Mental Illness Affirmed**

Family Court terminated respondent mother’s parental rights with respect to the subject child on the ground of mental illness. The Appellate Division affirmed. The testimony of petitioner’s witnesses, including a court-appointed psychologist, established that the mother was so disturbed in her behavior, feeling, thinking and judgment that, if her child was returned to her custody, her child would be in danger of becoming a neglected child. Further, the mother’s testimony substantiated the psychologist’s opinion that the mother’s condition would not improve in the foreseeable future.

*Matter of Dorean G.*, 126 AD3d 1384 (4th Dept 2015)

### **Affirmance of Termination of Parental Rights on the Ground of Permanent Neglect**

Family Court terminated respondent mother’s parental rights with respect to the subject children on the ground of permanent neglect. The Appellate Division affirmed. Although the court erred in admitting hearsay testimony from one of petitioner’s witnesses, any error in the admission of those statements was harmless because the result reached would have been the same even had such statements been excluded. Petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and the children. Despite her participation in some of the services afforded her, the mother did not successfully address or gain insight into the problems that led to the removal of the children and continued to prevent the children’s safe return. The mother did not request a suspended judgment at the dispositional hearing, and thus failed to preserve for review her contention that the court erred in failing to grant that relief. However, the record established that any progress that the mother made was not sufficient to warrant any further prolongation of the children’s unsettled status.

*Matter of Kyla E.*, 126 AD3d 1385 (4th Dept 2015)

### **Termination of Parental Rights Proper Where Father Abandoned Children**

Family Court terminated respondent father’s parental rights with respect to the subject children on the ground of abandonment. The Appellate Division affirmed. Petitioner established abandonment by the requisite clear and convincing evidence, by establishing that the father evinced an intent to forego his parental rights and

obligations for the six-month period before the filing of the instant petition. Among other things, the father did not make any visits to the children during the first five months of the six-month period prior to commencement of the abandonment proceeding despite having a right to weekly visitation. During such time frame, the father availed himself of other travel and vacations, but elected not to see his children. Although the father was incarcerated for the final month of the six-month period and of course was not able to visit the children at that time, he was still presumed able to communicate absent proof to the contrary. Petitioner established that the father did not communicate with the children or their foster parents during the final month of the six-month period. The conflicting testimony of the father and the caseworker presented a credibility issue for Family Court to resolve, and its resolution of credibility issues was entitled to great weight. The father's payment of partial child support arrears, under the circumstances of this case, did not constitute communication with the children or petitioner sufficient to defeat an otherwise viable claim of abandonment.

*Matter of Anthony C.S.*, 126 AD3d 1396 (4th Dept 2015)

### **Parental Rights Properly Terminated on Ground of Permanent Neglect**

Family Court terminated respondent father's parental rights with respect to the subject child on the ground of permanent neglect. The Appellate Division affirmed. Petitioner presented the requisite clear and convincing evidence that the assigned caseworker made repeated and diligent efforts to encourage and strengthen the parental relationship between the child and the father, who was incarcerated, including through written correspondence and telephonic communication. Petitioner established that, despite those efforts, the father failed substantially and continuously or repeatedly to maintain contact with or plan appropriately for the child's future. The father's failure to provide an realistic and feasible alternative to having the child remain in foster care until his release from prison supported a finding of permanent neglect.

*Matter of Davianna L.*, 128 AD3d 1365 (4th Dept 2015)

### **Termination of Parental Rights on Ground of Abandonment Affirmed**

Family Court terminated respondent father's parental rights with respect to the subject child on the ground of abandonment. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that respondent abandoned the subject child for the period of six months immediately prior to the date on which the petition was filed, and it was well settled that this lack of contact evinced his intent to forego his parental rights. Even assuming, arguendo, that the father was correct that he visited the child once within a few days after the six-month period commenced, such insubstantial contact was insufficient to defeat the claim of abandonment. The father's contention was rejected that petitioner discouraged contact between the father and the subject child. The father correctly conceded that, in this abandonment proceeding, petitioner was not obligated to contact the father and initiate efforts to encourage his parental relationship with his child. Furthermore, the father failed to establish that he

was unable to maintain contact with his child, or that he was prevented or discouraged from doing so by petitioner. The father's further contention was rejected that Family Court erred in denying his request to award custody of the subject child to the child's paternal grandmother, instead of awarding custody to petitioner so that the child may be adopted by her foster parents. It was well settled that, in the context of a dispositional hearing after the termination of parental rights, a nonparent relative of the child did not have a greater right to custody than the child's foster parents. The fact that the child's grandmother would be a good caretaker was not a sufficient reason to remove the child from the only home she had ever known and from a family with whom she had bonded. Thus, it was in the child's best interests to award custody to petitioner.

*Matter of Lundy S.*, 128 AD3d 1365 (4th Dept 2015)

### **Family Court Did Not Abuse Discretion in Refusing to Enter Suspended Judgment**

Family Court terminated respondent father's parental rights with respect to his son on the ground of permanent neglect. The Appellate Division affirmed. Family Court did not abuse its discretion in refusing to enter a suspended judgement. Petitioner established that the father failed to complete substance abuse treatment successfully, attend scheduled visitation with the child consistently, or verify that he had obtained stable income and housing. Therefore, the record supported the court's refusal to grant a suspended judgment inasmuch as the record established that the father had no realistic feasible plan to care for the child and that he was not likely to change his behavior.

*Matter of David W.*, 129 AD3d 1461 (4th Dept 2015)

### **No Error in Revocation of Suspended Judgment**

Family Court changed the permanency goal for the subject child to adoption and revoked respondent mother's suspended judgment after a hearing and terminated the mother's parental rights to the child. The Appellate Division affirmed. The mother's contention was rejected that she was denied due process and a fair trial because the court undertook the role of a prosecutor and demonstrated bias against her. The Judge did not exceed his authority to question witnesses or to elicit and clarify testimony, and acting in the best interests and welfare of the child was not a denial of due process to the parent. It was not necessary that a party file a notice of motion and motion to revoke the suspended judgment in order for the court, on its own initiative, to conduct a hearing on that issue. The preponderance of the evidence at the hearing established that the mother knowingly and willfully violated certain conditions of the suspended judgment and that termination of the mother's parental rights was in the best interests of the child.

*Matter of Emily A.*, 129 AD3d 1473 (4th Dept 2015)

### **Lack of Cooperation From Parent Frustrated Agency's Efforts**

Family Court terminated respondent mother's parental rights with respect to the subject child on the ground of permanent neglect. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and the child. The agency's efforts, no matter how diligent, could be frustrated by the lack of cooperation from the parent, and the record established that such frustration of the agency's efforts occurred in this case. Furthermore, the mother failed substantially and continually to plan for the future of the child.

*Matter of Qua'mel W.*, 129 AD3d 1487 (4th Dept 2015)

### **Parental Rights Properly Terminated on Ground of Permanent Neglect**

Family Court terminated respondent mother's parental rights with respect to the subject child on the ground of permanent neglect. The Appellate Division affirmed. Petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and the child. Despite her participation in some of the services afforded to her, the mother did not successfully address or gain insight into the problem that led to the removal of the child and continued to prevent the child's safe return. The mother failed to plan for the future of the child, although able to do so. The mother did not comply with her service plan, inasmuch as she did not regularly attend visitation, find stable housing, or consistently engage in mental health treatment. The record supported the court's determination that a suspended judgment was not in the best interests of the child.

*Matter of Zachary H.*, 129 AD3d 1501 (4th Dept 2015)

### **Parental Rights Properly Terminated on Ground of Permanent Neglect**

Family Court terminated respondents mother's and father's parental rights with respect to the subject child on the ground of permanent neglect and freed the child for adoption. The Appellate Division affirmed. Petitioner presented the requisite clear and convincing evidence that the agency made diligent efforts to encourage and strengthen the relationship between the parents and child by providing services and other assistance aimed at ameliorating or resolving problems that prevented the child's return and that the parents failed substantially and continuously to plan for the child's future. Although the parents participated in services offered by petitioner, they failed to successfully address or gain insight into the problems that led to the child's removal.

*Matter of Alexander S.*, \_\_\_ AD3d \_\_\_ (4th Dept 2015)

### **Family Court Did Not Abuse Discretion in Declining to Enter Suspended Judgment**

Family Court terminated respondent mother's parental rights with respect to the subject children on the ground of permanent neglect. The Appellate Division affirmed. Family Court did not abuse its discretion in refusing to enter a suspended judgment. The record at the dispositional hearing established that any progress the mother made was not sufficient to warrant further prolongation of the children's unsettled familial status.

*Matter of Renyhia A.*, \_\_\_ AD3d \_\_\_ (4th Dept 2015)